IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3240 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VINOD DUDABHAI DESAI

Versus

JAYSHREEBEN VINODKUMAR DESAI

Appearance:

MR HJ NANAVATI for Petitioners

MR BM MANGUKIYA for Respondent No. 1

Mr.B.Y.Mankad,PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 26/06/2001

ORAL JUDGEMENT

1. Rule. Heard Mr.H.J.Nanavaty for the petitioners and Mr.B.M.Mangukia for the respondent No.1 appearing as

amicus curie. Mr.B.M.Mangukiya for respondent No.1 and Mr.B.Y.Mankad, Ld.APP for respondent N0.2 waive service of rule. With the consent of learned counsel for parties matter is taken up for final hearing today.

2. There is a dispute between the parties regarding the custody of a minor daughter-Khyati. The applicant No.1-Vinod Dudabhai Desai is father and opponent No.1-Jayshreeben is the mother. Jayshreeben had filed an application under section 97 Cr.P.C. for issuing search warrant against her own husband-Vinod-applicant No.1 for forcibly taking away her minor daughter-Khyati from her custody. The said application No.26/99 was filed before the Court of Judiciaal Magistrate First Class, Keshod. On behalf of applicant, preliminary objection was raised before the JMFC, Keshod about the territorial jurisdiction by filing a detailed reply because neither the applicant-Jayshreeben nor the opponents- Vinod Dudabhai Desai and Dudabhai Devjibhai Desai-present applicants was staying in the territorial jurisdiction of the court of JMFC,, Keshod.

3. Without deciding the preliminary objection about the territorial jurisdiction of the learned Magistrate, the learned Magistrate proceeded to pass the order under section 97 Cr.P.C. on 8.4.1999. In pursuance of that the statement of the minor-Khyati was recorded and when she was produced before the learned Magistrate she stated at that time that she wanted to stay with her father.

4. The applicants have filed this petition and challenged the proceedings initiated by the opponent No.1-Jayshreeben under section 97 Cr.P.C. before the JMFC, Keshod. There was interim order in favour of applicants. However, when the same was not extended, through oversight, while adjourning the matter the custody of the child was taken at the behest of the learned Magistrate. Therefore, it is stated at Bar that by way of mandatory order the custody of the child was restored to her father-Vinod-applicant No.1 and since then the custody is with her father.

5. Learned Counsel-Mr.Nanavaty for the applicants raised two submissions, i.e. (i) regarding territorial jurisdiction and the learned Magistrate not entertaining the application and issuing the search warrant under section 97 of Cr.P.C. and, (ii) no such search warrant could have been issued by the court against the father of a child. In suppport of his two submissions, he has placed reliance upon the judgment of the Apex Court in the case of Ramsesh vs Lakshmibai reported in 1998(9) SCC

6. About the second submission, I am not inclined to go into it at present because I am of the considered opinion that when the preliminary objection regarding territorial jurisdiction of the learned Magistrate was raised before the learned Magistrate, then before passing any further order in the proceedings under section 97 Cr.P.C., he should have decided that point first.

7. Under the circumstances, Ld.counsel Mr.Nanavaty for the applicants and Mr.Mangukia for the opponent No.1 agreed that the learned Magistrate be called upon to decide the preliminary objection regarding territorial jurisdiction of his court in the matter and then only he should proceed further with the matter if he decides it against the present applicants. It goes without saying that while deciding the matter on merits, if at all, he comes to conclusion that he has territorial jurisdiction in the matter, then he will decide the matter in accordance with law considering the judgment of the Apex Court in the matter of Ramesh (supra) and other judgments cited by the learned counsel for the parties before him.

8. In view of the above, this application is allowed, and the learned Magistrate is directed to first decide the preliminary objection regarding territorial jurisdiction in the matter which has been raised by the present applicants before the court, as early as possible, and preferably within two months from the date of receipt of copy of this order. After hearing the learned counsel for the parties, if he comes to conclusion that he had territorial jurisdiction then only he shall decide the matter in accordance with law.

9. With the above observations and directions, this application is allowed to the aforesaid extent. Interim relief granted earlier stands vacated with the clarification that till the Ld.Magistrate decides the preliminary objection regarding territorial jurisdiction, the custody of the child shall remain with the applicant No.1-father-Vinod who is the father of the child. Rule is made absolute accordingly.

26.6.2001 (B.J.SHETHNA,J)
mty